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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 2 2 2005
EAC 03 027 55268

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate at the [redacted] Center for Mental Retardation (hereafter "Shriver Center") at the University of Massachusetts Medical School. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

In a cover letter accompanying the initial filing, counsel states, with regard to labor certification: "The Department of Labor's regulations do not take into account . . . that research in most areas of science and technology funded by the United States government is cutting-edge in nature and usually involves innovative ideas and techniques." Congress plainly did not establish blanket waivers for scientific researchers, and the assertion that the labor certification is flawed with regard to scientists does not persuade us that such researchers presumptively qualify for the national interest waiver. Whatever imperfections may exist in the labor certification program, CIS is not of the opinion that the national interest waiver exists simply as a means for aliens to bypass labor certification, or as a stopgap solution in place of needed reforms. Eligibility for the waiver must rest on the individual merits of the alien, rather than on general complaints regarding the nature of labor certification and its purported unsuitability for aliens in certain occupations.

Counsel states: "As a further indication of [the petitioner's] prior achievements, she has been elected to two important professional associations in her field of expertise: the International Society of Plastination [sic; the actual name is the International Society *for* Plastination] and Society for Neuroscience." The record shows that the beneficiary is a member of both of these societies, but it does not indicate the membership criteria for either society. Therefore, we cannot conclude that the petitioner's memberships are an "indication of [her] prior achievements."

Four witness letters accompany the petition. Dr. [redacted] director of the Division of Developmental Neuroscience at the Shriver Center, states:

> [The petitioner's] research involves Vitamin A, an essential nutrient that is converted within the body to its active form [redacted] (RA). In particular, [the petitioner] is studying how RA directs the development of certain parts of the embryonic brain. Without the signaling process mediated by RA, severe development difficulties result. . . .
>
> More recently, it was discovered that an excess of Vitamin A can be equally dangerous. . . .
>
> The focal point of [the petitioner's] research is the hindbrain, an embryonic structure that develops into the cerebellum, pons and medulla oblongata which, in turn, merges with the spinal cord. These structures control motor activities and subconscious brain functions, and they coordinate automatic activities which keep us moving and alive. It is known that the embryonic patterning of the hindbrain structure is dependent on RA. The specific roles of individual RA receptors has been unclear, however. Further, while it is known that the

> production of RA in the embryo is controlled by specific enzymes that convert Vitamin A to RA, as well as by enzymes that convert RA to inactive 4-oxo RA, the precise nature of this mechanism has yet to be delineated. A proper balance of RA synthesis and degradation has a profound influence on the shape, growth and rate of maturation of cells of the cerebellum.
>
> [The petitioner's] research is aimed at developing information concerning (1) RA synthesis and degradation in the developing hindbrain; (2) identification of the mechanism by which RA interferes with the development of two hindbrain nuclei; and (3) the effects of excess and insufficient RA on hindbrain development. . . .
>
> At the same time as her research in Japan on Parkinson's disease, [the petitioner] developed and published a new technique of anatomical preservation after sectioning, called plastination. This process allows cross sections of the brain, to be fixed in a plastic-like polymer and preserved with remarkable integrity and durability. [The petitioner's] exploration of plastination resulted in five papers and an invitation to become a member of the International Society for Plastination by virtue of her extraordinary contribution in this field.

[redacted]tates that the petitioner "is one of the world's leading experts" in plastination. The record contains little information about the International Society for Plastination, and we cannot confirm that her election to that society was contingent on the nature of her contributions. A document submitted by the petitioner indicates that "Plastination is a technique for preservation of tissue, introduced in 1977 by [redacted] There is no indication that the petitioner worked with plastination prior to 1990. Therefore, [redacted] assertion that the beneficiary "developed . . . a new technique . . . called plastination" is, to say the least, grossly inaccurate. The petitioner's publications regarding plastination do not discuss the technique itself, but rather the construction of computer databases of images of plastinated specimens.

When considering the implied prestige of membership in the International Society for Plastination, we note that the membership certificate contains several errors. At one point, the certificate refers to "The International Society *of* Plastination," although the society's seal states the name as the "International Society *for* Plastination." The certificate, dated "Septe*n*ber 1, 1996," indicates that the petitioner "is entitled *too* all privileges" of membership (emphasis added).

Dr. [redacted] now the director general of Japan's National Institute for Basic Biology, was previously a professor who supervised the petitioner's research at the University of Tokyo. Dr. [redacted] states that the petitioner's work in Tokyo was "extraordinary," and that her published work has "been cited in many articles authored by others in international scientific journals." Dr. [redacted] asserts that the petitioner "has clearly risen to the top rank of expert in the field of plastination." The record contains no evidence of the claimed citations by unidentified "others," and no objective documentation to establish that the petitioner is widely regarded as a top plastination expert.

Professor [redacted] of the University of Vermont states that the petitioner's area of research is an important one. There are no blanket waivers based primarily on an alien's choice of research specialty; we must also consider the alien's impact in that specialty. Prof. Forehand states that the petitioner's combination of abilities and extensive experience base is unusual" and "particularly helpful for the research that she is carrying out." Prof [redacted] claims no specific familiarity with the petitioner's work; instead, she indicates that her knowledge of the petitioner's work derives from a "letter from her laboratory director which I have reviewed so that I can understand what research results can be expected in the future."

Dr. [redacted] chief of the Differentiation Control Program at the National Cancer Institute's Laboratory of Cellular Carcinogenesis and Tumor Protection, states that the petitioner's "experience as a doctor, a histologic analyst and an anatomist as well as her equally impressive research experience . . . .are highly unusual abilities in any research associate." [redacted] states "the research abilities and results achieved by [the petitioner] are of a far higher scientific quality than those expected from the usual research associate." Neither of the two independent witnesses (Prof. [redacted] and Dr. [redacted] discuss the petitioner's work in any detail or explain her specific contributions to the understanding of RA's role in embryonic neurological development.

The director denied the petition, stating that the petitioner does not qualify for a waiver simply by virtue of being a well-trained and competent researcher. The director stated "we are not persuaded that the benefit of [the petitioner's] work would be national in scope," and noted that the witness letters "speak of the beneficiary's accomplishments in glowing, but general terms."

On appeal, counsel protests that the director offered no explanation for the finding that the petitioner's work is not national in scope. We agree with counsel that the petitioner's scientific research is not limited to any geographic location, and therefore can be said to be national in scope. We also agree with counsel's assertion that the director probably should have issued a request for evidence, pursuant to 8 C.F.R. § 103.2(b)(8), before denying the petition. The most expedient remedy at this point is to consider on appeal any documents that the petitioner would have submitted in response to a request for evidence.

Counsel states that the petitioner's "letters . . . did not all come from individuals who had been personally involved with her as a colleague or friend. Rather, the letters . . . were from a mix of people specifically calculated to meet all of the requirements of the Service." While it is true that we value letters from truly independent witnesses, this is because such letters serve to demonstrate that the alien's impact has not been limited to collaborators and mentors. In this instance, the independent witnesses speak of the petitioner's work only in the most general terms. In effect, the letters primarily serve to establish that the petitioner is well-qualified to conduct important research, which the director has not disputed.

The director stated: "It does not appear that [redacted] had knowledge about the beneficiary and the research projects in which she is involved in [sic] prior to reviewing the materials that were provided to her in order for her to write a testimonial for the purpose of supporting this petition." Counsel disputes this finding, stating: "The authors of the expert supporting letters were aware of [the petitioner's] research without having to review documentation that was created for the purpose of supporting the petition." Counsel supports this claim with excerpts from Dr. [redacted] letter, such as the assertion that the petitioner's "past achievements are well documented, of course, by her published scientific articles." This statement says nothing of [redacted] prior familiarity with the petitioner's published work; she did not specify when she first became aware of these publications. Counsel notes [redacted] assertion that "I am aware of the research being carried out by [the petitioner] at the Shriver Center," but elsewhere counsel asserts that "the results of [the petitioner's] then-current research had yet to be published," and therefore [redacted] had to rely on [redacted] letter for information about that research. These assertions appear to be incompatible.

Counsel asserts that, because the petitioner's work at the Shriver Center "is current, the results have yet to be published," and therefore only a few individuals are qualified to comment on that work. For this reason, counsel states, the petitioner has submitted a letter from [redacted] however, does not discuss any of the petitioner's specific findings; she only states that the petitioner is researching an important subject (embryonic brain development) and that the petitioner "brings to her research two outstanding skills," namely

clinical experience as a physician and past experience as a researcher. [redacted] does not indicate that the petitioner has already advanced this area of study to a greater extent than other qualified researchers have done. When weighing [redacted] assessment of the petitioner's work, we cannot ignore her erroneous claim that the petitioner "developed . . . a new technique of anatomical preservation . . . called plastination." The technique was 25 years old when [redacted] wrote her letter.

Counsel states that the petitioner "has demonstrated 'a past history of demonstrable achievement with some degree of influence on the field as a whole.'" The discussion that follows this claim, however, is for the most part a critique of *Matter of New York State Dept. of Transportation* and the director's interpretation thereof; counsel does not explain how the petitioner has, in fact, influenced the field as claimed.

In another section of the brief, counsel quotes at length from the previously submitted witness letters, and indicates that these letters demonstrate the petitioner's past achievements. As we have already noted, [redacted]'s discussion of the petitioner's present work consists of a discussion why it is important to research the role of RA in early brain formation. This is not specific to the petitioner, because this research topic would be important no matter who was conducting the research. Eligibility for the waiver must rest with the alien's own qualifications and accomplishments rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *See Matter of New York State Dept. of Transportation* at 215. The other witnesses state only that they believe that the petitioner will eventually uncover useful information that will further our knowledge regarding RA and early brain development.

Counsel repeats the initial claim that the petitioner's election to "two important professional associations" demonstrates her impact on the field. At no time, however, has the petitioner ever submitted any evidence to show that her memberships in these organizations were tied to special achievements rather than to baseline professional competence. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). This fundamental principle holds regardless of how often counsel repeats the unsupported claim. It cannot, will not, and does not suffice simply to repeat the bare assertion that the petitioner must have considerable standing in the field because she belongs to two professional societies.

While the petitioner's work at the Shriver Center had yielded no publications as of the petition's filing date, four articles appeared between the filing of the petition and filing of the appeal. Counsel states that the petitioner's "current publications have been cited by others." Counsel, in the appellate brief, does not specify the number of citations. The materials submitted on appeal show three citations of an article that appeared in August 2003. There is no evidence that any of the other articles have been cited at all.

Counsel observes that neither the regulations nor *Matter of New York State Dept. of Transportation* mention, let alone require, evidence of such citations. (Regulations specific to the national interest waiver do not mention professional memberships either, but counsel is emphatic that these memberships are strong evidence of eligibility.) *Matter of New York State Dept. of Transportation* does mention an alien's impact on the field as a factor to consider. The term "impact" is necessarily broad, because the national interest waiver is available not only to scientists, but also to aliens in other professions, the arts, and other non-scientific fields (indeed, the beneficiary in *Matter of New York State Dept. of Transportation* was not a scientist). Within the sciences, independent citations are an objective means by which to measure an alien's impact, and they have the added advantage of existing as part of the normal operation of scientific endeavor, rather than being created specifically for the express purpose of supporting an immigrant petition. The AAO has never held, however, that it can suffice simply to establish that one's work has been cited. The *quantity* of citations must

be considered as well. Journal publishers are aware of this, hence the term "impact factor," which refers to the frequency of citations of articles from a given journal. The petitioner has not shown that it is unusual for an author in her specialty to receive three citations.

The only other new evidence regarding the petitioner is a letter from Professor [redacted] of the Cleveland Clinic Foundation's Lerner Research Institute. Prof. [redacted] states that she has followed the work of the Shriver Center ever since she worked there in the early 1980s. Prof. [redacted] offers general observations about the nature of publishing scientific findings in scholarly journals, and asserts that some of the petitioner's newly published articles have appeared in top journals. She contends that a recent article by the petitioner "clearly influenced the thinking of a huge readership." She bases this assertion solely on the observation that the article "was the subject of a 'highlights' article in *Nature Reviews*, the leading international journal in the biological field." She offers no empirical evidence that publication in *Nature Reviews* inevitably equates to influence in the field. At this point, only a very short time after the first articles from the petitioner's current work have appeared, it seems to be too early to gauge the impact of her work.

Prof. [redacted] asserts that "an agency of the Federal government [is] doing all in its power to interfere with – even end – the important research of" the petitioner. The approval of an H-1B nonimmigrant visa, which has allowed the petitioner to work at the Shriver Institute, is proof enough that there is no single-minded conspiracy centered around destroying the petitioner's career. We note that postdoctoral research fellow positions are generally, by nature, temporary training assignments. The *curricula vitae* of the petitioner's witnesses indicate that their own postdoctoral positions generally lasted between two and four years. There is no indication that the petitioner's postdoctoral position is an exception or that the Shriver Center seeks to employ the petitioner permanently. The petitioner has obviously been able to research and publish as a nonimmigrant, and no one has explained how the outcome of this proceeding would alter that arrangement. The denial of the waiver request does not, in any way, terminate the petitioner's valid nonimmigrant status or her employment authorization. The director has not flatly stated that the petitioner is ineligible for the immigrant classification she seeks. The petitioner is obviously a member of the professions holding an advanced degree, and thus she readily qualifies for the classification. At issue here is whether the petitioner seeks an additional benefit that is generally not granted to advanced-degree professionals, specifically an exemption from the statutory job offer requirement. The director's refusal to grant this added benefit is not, by any rational standard, a deliberate effort to interfere with or end the petitioner's research. The denial of the waiver request is not *prima facie* evidence of misconduct by the director.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.